Supreme Court, U.S.
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No. 95-161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FRED W. TRIEM AND DAVID A. BERG,
Petitioners,

v.

TAMICO, INC.,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are the claims of respondent for services rendered within the exclusive jurisdiction of the federal court sitting in Admiralty?

A. Do the federal courts have admiralty jurisdiction for the retrieval of a land based aircraft from navigable waters?

B. Do the federal courts sitting in admiralty have jurisdiction over claims for recovery services rendered pursuant to contract?

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U.S. CONSTITUTIONAL PROVISIONS AND STATUTES

Admiralty Clause, U.S. Constitution

Article III, Section 2, Clause 1: The judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction . . .

28 USC §1333, Maritime and Prize Cases

The District Courts shall have original jurisdiction, exclusive of the courts of the states, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. (As amended May 24, 1949, C.139, §79, 63 Stat. 101.)

ALASKA STATUTES

AS 22.15.030 CIVIL JURISDICTION

(a) The District Court has jurisdiction of civil cases, including foreign judgments filed under AS 09.30.200 and arbitration proceedings under AS 09.43.170, as follows:

(1) For the recovery of money or damages when the amount claimed, exclusive of costs, interest, and attorney fees does not exceed $50,000;

. . .

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FRED W. TRIEM, DAVID A. BERG, and PETERSBURG AIRCRAFT SALVORS, INC.,
Petitioners,

v.

TAMICO, INC.,
Respondent.

On Petition for Writ of Certiorari to the Superior Court, First Judicial District, at Petersburg, Alaska

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests that the court deny the petitioners' request for Writ of Certiorari herein.

OPINIONS BELOW

This litigation commenced with the filing of a complaint requesting compensation for services rendered to the petitioners. The complaint was filed in District Court for the

First Judicial District, State of Alaska, at Petersburg, Alaska.[1]

In the summer of 1991 Judge Schulz dismissed the petitioners' answer and entered default against them as the final sanction for failure to file responses to respondent's discovery requests. Several months later, petitioners first raised the issue of the alleged lack of jurisdiction by the State courts. This position was rejected by Judge Schulz (see brief of petitioners at App. 1) and Judge Carpeneti (see petitioners' brief at App. 7). The Alaska Supreme Court rejected petitioners' request for discretionary review.

JURISDICTION

Respondent believes that nearly 200 years of reliance upon the saving to suitors clause, 28 USC §1333(1) and decisional law thereunder clearly show that the petitioners' arguments are in error. The state courts had jurisdiction to resolve this dispute. If this court should have jurisdiction in this matter, it would lay in the purported conflict between the State court's interpretation of the saving to suitors clause, 28 USC §1333 and the federal Constitution, Article III, Section 2, Clause 1.

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[1] State District Courts have limited jurisdiction in civil cases, i.e., claims not exceeding $50,000 exclusive of costs, interest and attorney fees. AS 22.15.030(a). Judge Schulz had been appointed to sit as Superior Court Judge at Ketchikan, Alaska. The Superior Court is the court of general jurisdiction in the State of Alaska. Following recusal of the judge assigned to the Petersburg judicial area, Judge Schulz was assigned to sit in the District Court proceeding.

STATEMENT OF THE CASE

This case relates to charges for services rendered by respondent at petitioners' request for retrieval of a DC-3 aircraft which had crash landed in the Wrangell Narrows near Petersburg, Alaska. The aircraft was owned by a third party at the time of the unplanned landing in the waters near Petersburg, Alaska.

Petitioners' use of the term "on an international flight" (see Petition at 3) is possibly misleading. The empty aircraft was being transported from North Central Alaska to the mainland United States. Although, it is quite possible that the aircraft passed over Canadian air space on its route from Fairbanks to Petersburg, no evidence was presented in the State court proceedings as to those facts. Following the crash landing, the individual petitioners located the sunken aircraft.[2] Petitioners entered into a written contract with respondent to rent respondent's towboat, barge and crane at the rate of $400 per hour. Petitioners refused to pay for the services rendered.

As noted in petitioners' brief (at 3-4), petitioners Berg and Triem, individually or through third parties acting at their direction, located and marked the site of the sunken aircraft. Later, Triem and Berg, or persons acting at their direction, performed the underwater work to attach onto the aircraft for its retrieval from the water. Respondent's crane lifted the aircraft onto its barge. The barge was towed to shore, several miles away. The aircraft was then placed on shore at the Petersburg seaplane ramp.

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[2] No evidence was presented in the State proceedings as to whether the individual petitioners acted independently in locating and retrieving the aircraft or whether they had done so in agreement with the owners or insurers of the aircraft.

In the latter portion of the Statement of the Case petitioners pose an outline of their arguments for review of this case. (Brief at 7-9) They assert that this is a case in admiralty and then proceed to equate admiralty jurisdiction with exclusivity of federal jurisdiction. Respondent replies, as did Judges Schulz and Carpeneti, that, assuming *arguendo* this is an admiralty case, pursuant to the Constitution and saving to suitors clause, such cases can be filed in state or federal court; the federal courts *may* have jurisdiction. U.S. Constitution, Article III, Section 2, Clause 1; 28 USC §1333(1).

Respondent agrees that the aircraft came to rest in the Wrangell Narrows, which are navigable waters within the United States. As discussed more fully *infra* at 14-15, respondent maintains that retrieval of a land based aircraft which fortuitously came to rest in navigable waters is not a "maritime matter." Respondent also disagrees that this dispute relates to a "maritime contract" or "salvage" within the exclusive jurisdiction of the federal court sitting in admiralty.

It is important to note that the "salvors" were the petitioners. Respondent contracted to provide services at specifically agreed upon rates.[3] As is more particularly described hereinafter, "voluntary salvage" arguably may lie within the exclusive jurisdiction of the federal courts, but not so for "contract salvage." (*Infra* at 16-17) There is no need for the special expertise of the admiralty court in determining a salvage award, nor in determining the import of any treaties; this case merely calls for a common review of a contractual relationship.

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[3] This factual situation is quite similar to that in *Thames Shipyard and Repair Company v. Willametz*, 428 A.2d 1143 (Conn. Super. 1978).

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioner Triem has misread the import of the Constitutional grant of admiralty jurisdiction, Article III, Section 2, Clause 1, and the saving to suitors clause, 28 USC §1333(1). The Constitutional provision merely states that the courts *may* hear admiralty cases. The "saving to suitors" clause simply states that except in certain unique situations disputes which have contact with navigable waters may also be heard in state courts. Respondent posits that there is a substantial question whether federal courts do have jurisdiction in this case, absent diversity of citizenship and given the amounts at issue. Assuming *arguendo* that the federal courts could have jurisdiction, there is no conflict with the Constitution created by allowing the matter to remain in State court.

LEGAL ARGUMENT IN OPPOSITION TO PETITION

INTRODUCTION

It is respondent's belief that it was entitled to choose between bringing the *in personam* contract action for services rendered, or an admiralty salvage claim against the petitioners and/or an *in rem* action against the aircraft.[4] Respondent submits that it has chosen appropriately to submit the matter to the jurisdiction of the State court

[4] See also *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, 323 (E.D. La. 1991). Cases should be removable only when the basis is other than their maritime or admiralty nature. It is immaterial that plaintiff [respondent] could plead another claim, what is material is that [it] chose not to elect that remedy. *Fogelman v. Tidewater Barges, Inc.*, 747 F.Supp. 348, 355 (E.D. La. 1990).

and the court had full jurisdiction to enter the appropriate judgment which has resulted. The petitioners have submitted extensive historical argument in support of their position, but their presentation is not on point with the issues at hand. Although the U.S. District Court might *also* have had jurisdiction, it did not have exclusive jurisdiction as the operation herein was not a "salvage":

> The formal elements of a valid salvage claim under the general maritime law are well-known: (1) there must be a maritime peril . . .; (2) the salvage service must be voluntarily rendered and not required by an existing duty or by special contract; and, (3) the salvage efforts must be successful, in whole or in part. Schoenbaum, *Admiralty and Maritime Law*, (Hornbook Series) §15-1 at 502 (West 1987). See also: Morris, 3A *Benedict on Admiralty*, 7th Ed., §§2, 3. *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1104 (9th Cir. 1985), citing to *The Sabine*, 101 U.S. (11 Otto) 384 (1879).

As will be more particularly argued hereinafter: (1) there was no "maritime peril" as the contractual services related to the recovery of a land based aircraft at rest rather than in an emergency; (2) the services were rendered pursuant to a specific contract for a fixed price rather than for a "salvage award;" and, (3) the compensation for services was not contingent upon any result of the outcome.

CONTRACTUAL CLAIM—"SAVINGS TO SUITORS"

Respondent submits that the claim it made was one for payment of a sum certain for services rendered, which by chance took place on or about navigable waters. It believes that it is entitled to payment in full of the billing, and that the judgment was appropriately rendered herein. As mentioned above, the claim for compensation

differs markedly from a "salvage claim," the purported exclusive jurisdiction of the admiralty court. The only need for the special expertise of an admiralty court lies in its need to determine which persons are entitled to ownership or compensation and to determine the amount of that compensation. Herein the parties to the contract are clear as are the terms of compensation for services rendered.

Initially the court must consider that even in dealing with contracts with a maritime connection, one must differentiate between voluntary and contractual salvage, since the latter is excluded from the category of exclusive maritime jurisdiction. *Flagship Marine Services v. Belcher Towing*, 966 F.2d 602, 605 (11th Cir. 1992). In that case the owner posited that compensation for services rendered in assisting a sunken tug and its tow should be determined by the contractual rates previously charged by the "salvor" for prior services rendered. The purported salvor argued that it was entitled to a salvage award based on risk incurred and quality of services rendered.[5] As respondent has noted above, to establish a voluntary salvage, one must show: (1) marine peril; (2) voluntary services not required pursuant to existing duty or special contract; and (3) compensation contingent upon whole or partial success, *Flagship Marine Services*, 966 F.2d at 605; *U.S. Dominator*, 768 F.2d at 1104.

The most common types of admiralty salvage claims are those brought *in rem* against the vessel for an award

[5] There are six elements of a salvage award: (1) amount of labor expended by salvors; (2) skill of the salvor services; (3) value of and risk to salvor's equipment; (4) risk to the salvors; (5) value of the property saved; and, (6) the degree of danger to the salved property. *U.S. Dominator, Inc.*, 768 F.2d at 1104-05.

based on the value of the services rendered and, more specifically, "a bounty for meritorious services rendered and to encourage others to do likewise," M. Morris, 3A *Benedict on Admiralty*, 7th Ed. (Matthew-Bender 1991), §14 at 1-21. That commentator specifically recognized that State courts have jurisdiction when the action is one for compensation based on *quantum meruit* or for services where the price has been agreed upon, *Id.* §14, at 1-20 to 1-21. The State courts can determine the contract claim, but cannot make a "salvage award," i.e., the bonus which may be awarded in certain salvage operations. That same commentator favorably discussed at length the basis for state court jurisdiction, *Id.* at 1-23 to 1-24, citing *Merritt and Chapman Derrick and Wrecking Company v. Tice*, 77 App. Div. 326 (N.Y. 1902). In that case the plaintiff, at the request of the defendant, furnished services in the amount of $4,249.48. The defendant moved to dismiss, arguing lack of State court jurisdiction. The court stated:

> It is conceded by both parties hereto that if the contract averred in the complaint is a *maritime contract for salvage*, the State courts have no jurisdiction. Such undoubtedly is the rule. It does not follow, however, that a *valid contract* may not be made for compensation for *work, labor and services*, even though the subject matter of the action might furnish the basis of a claim for salvage. The two matters are quite distinct. Where the *contract* is made to perform work, labor and services, either for a sum agreed upon or for a reasonable compensation for the services performed, *such contract is good and may be enforced in personam.* If there were no contract, a claim only for salvage might arise. The disposition, however, of such question rests upon different principles, and facts, which would support one, would wholly fail in support of the other. Thus, in the case of a *salvage*, the right of the person making the rescue to *compensation* is dependent *solely upon the*

> *fact that the property is saved*; this is a *condition precedent* to his right to receive any award. The *amount* of the award rests in the *discretion* of the court. In the case of a *contract to perform work, labor and services* in rescue of a vessel, subject to marine perils, the right to recovery for such service depends upon its rendition *pursuant to the contract*, and the party entitled to recover for such services is not deprived of such right even though the subject matter be wholly lost. . . . *A claim for salvage and a claim for work, labor and services are inconsistent.*
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> . . .
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> . . . the plaintiff will be authorized to prove a contract for work, labor and services, and, if established, recover therefore the fair value thereof, even though it might become entitled to salvage for the services rendered, in the absence of a contract. It is clear, however, that in order to maintain the action, it must prove the existence of a contract for the rendition of the service. *Under the pleadings the plaintiff could not recover under the theory it was entitled to salvage, as its right of recovery is strictly in personam and rests upon contract. Benedict* at 1-23 to 1-24. (Emphasis added.)

As contrasted to a "marine salvage" claim, respondent's contractual claim is not being asserted *in rem* against the "vessel"; the respondent's claim is not a "secret lien" against the world at large. Rather it made a direct, *in personam* personal claim against the *parties* with whom it contracted to perform the services, *Benedict* at §12, 1-18, 1-19. Contrary to petitioners' brief, the *Tice* decision is not an outdated, aberrant decision.

Benedict has long been held to be one of the premier authorities in admiralty law. The statements therein are supported by recent decisions. *State v. Vernooy*, 486 N.Y.S.2d 735 (Ad. 1985); *Metropolitan Dade County v.*

One (1) Bronze Cannon, 537 F.Supp. 923 (Fla. 1982); *Thames Shipyard and Repair Company v. Willametz*, 428 A.2d 1143 (Conn. Super. 1978); *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. 321, 323 (E.D. La. 1991); *Fogelman v. Tidewater Barges*, 747 F.Supp. 348, 355 (E.D. La. 1990). Judge Carpeneti relied on these cases in determining that there was a choice of forums in bringing this action, *Fogelman v. Tidewater Barges, Inc., supra*, Carpeneti Opinion (Petitioners' App. at 16-17).[6] Petitioners blandly assert that these cases are aberrations and contrary to the law. Respondent submits that these cases were appropriately determined and support denial of the Writ of Certiorari.

In *Vernooy*, the court found the specific trial court did not have authority to determine a reasonable salvage amount for the recovery of two cannons, but held that another state court, the Court of Claims, had authority to render a decision on the subject. More directly in point is *Dade County, supra.* In that case a marine exploration company had entered into an agreement with the Haitian government to conduct treasure salvage. The company found two cannons which were later, by agreement, displayed in a Florida museum. The successor in interest to the exploration company brought suit in state court for possession of the cannons. At a later point the county obtained the interest of a co-salvor of the cannons. The county then brought suit in federal court to determine the respective salvage claims. The individual claimant filed a motion to dismiss the District Court proceeding on the

[6] In *Fogelman* and *Bergeron* the District Court remanded the cases to state court on the ground that the cases did not come within the exclusive admiralty jurisdiction of the courts and they had been improperly removed to federal court.

ground that pursuant to 28 USC §1333 it was entitled to bring suit in the state court and, further, the previous decision in that court was *res judicata*. The federal court entered an order that the matter was within the exclusive jurisdiction of the admiralty court, and thus that the prior action was not binding upon it. It is important to note that the basis of that ruling was that the prior state action related to "claims against the world," i.e., an *in rem* action against the cannons rather than a contractual claim against the applicable parties. The court noted that the "saving to suitors" clause "enables maritime litigants to pursue available common law remedies, if they prefer them to those supplied in admiralty." *Id.* at 927.

> A plaintiff who has an admiralty claim for damages for breach of contract has several options: (1) "The claimant may invoke the federal admiralty jurisdiction under the grant of original subject matter jurisdiction, 28 USC §1333," or (2) "by virtue of a saving to suitors clause he may sue at law in state court or in federal district court. [If, however, the plaintiff elects the latter] the requirements of diversity of citizenship and the jurisdictional amount must be satisfied." (Citation omitted) The basic reason is that suits on maritime contracts are *in personam* and *may* be brought in federal court under the head of diversity jurisdiction. For instance, . . . "an action for personal injury cognizable in admiralty *may* be brought, assuming the existence of an *independent jurisdictional base* like diversity of citizenship as a civil suit pursuant to the 'saving to suitors clause' of 28 USC §1333," *Id.* at 927-928 (emphasis added). See also *Garrett and Moore-McCormack Company*, 317 U.S. 239, 245 (1942).

It's clear that a contract claim for services which fortuitously occurs upon navigable waters may be brought as a state court action or, if in District Court, only if the

other jurisdictional requirements, such as diversity, are met. In this case the petitioners could not have removed the contract action into U.S. District Court as none of the jurisdictional requirements could be met.

In *Dade County* the court noted that this alternative choice of state or federal forum is only applicable to *in personam* actions; *in rem* jurisdiction is exclusive in the federal courts, *Id.*, at 928. The court extensively discussed the distinguishing features between *in rem* and *in personam* actions:

> The distinguishing and characteristic feature of . . . [an *in rem*] suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this *dominion* of a suit in admiralty over the *vessel or thing* which gives to the title made under its decrees validity against *all the world.* By the *common law process*, whether of mesne attachment or execution, property is reached only through a *personal defendant*, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.
>
> . . .
>
> Admiralty's jurisdiction *is "exclusive" only as to those maritime causes of action begun and carried on as to proceeding in rem*, that is, where a *vessel or thing* is itself treated as the *offender* and made the defendant by name or description in order to enforce a lien. . . . The proceedings in this California partition case were not *in rem* in the admiralty sense. The plaintiffs' quarrel was with their co-owner, not with the ship. Manuel Madruga, not the ship, was made the defendant. Thus the state court in this proceeding acts only upon the interest of the parties over whom it has jurisdiction *in personam*, and does

> not affect the interest of others in the world at large, as it would if this were a proceeding *in rem* to enforce a lien. The California court is "competent" to give this partition remedy and it therefore has jurisdiction of the cause of action, *Dade County* at 928 citing *The Moses Taylor* 71 U.S. (4 Wall) 411, 431 (1866) and *Madruga v. Superior Court of California*, 346 U.S. 566, 560, 561 (1954) (Emphasis added).

In addition to noting the *in rem—in personam* distinction, the court also noted that the exclusive jurisdiction of the court involves a sailor's assertion of his right to a *monetary award* which maritime law provides as *an incentive to encourage persons to assist distressed or endangered vessels*, *Dade County* at 926 (emphasis added). It is noted that such suits are "not limited to the value of the services rendered and may 'include a *bounty* or [award] based upon the *risk* involved in the operation and the *skill* with this it is performed.' ", *Dade County* at 927 citing 3A *Benedict* (emphasis added). Respondent did not sue the vessel, nor did it ask for a "salvage award," a bonus. The fees were fixed and not contingent upon success. Rather than being within the exclusive domain of the federal courts, it is very questionable whether this claim could have been brought within federal court. As noted by Judge Carpeneti, federal courts have refused to accept removal of a case when merely based upon assertion that a common law claim was in reality an admiralty claim (Petitioners' App. at 17 citing *Fogelman*, 747 F.Supp. at 355).

In *Thames Shipyard and Repair Company*, the facts were very similar to the case at hand except that the contract was oral. The court therein applied state contract doctrine rather than maritime law, (see Carpeneti Opinion, at Petitioners' App. at 16). Similarly, in *Bergeron*, the court stated that the plaintiff should be allowed to choose

between contractual or salvage claims and, if contractual, may choose to proceed in state court pursuant to state law, *Bergeron*, 765 F.Supp. at 323 (see Petitioners' App. at 17). See also *Fogelman*, 747 F.Supp. at 355.

"PERIL"—RECOVERY OF AN AIRCRAFT

As stated, one of the elements of a "salvage claim" is that the thing must be at peril in a maritime situation. Respondent submits that merely because a land based aircraft came to rest in water does not place this case within the exclusive admiralty jurisdiction of the federal courts. As noted by petitioner, the law is, at best, undecided, and, more likely, contrary to petitioners' arguments that a land based aircraft is within the exclusive maritime jurisdiction. Petitioners place great weight upon *Mark v. South Continental Insurance Agency, Inc.*, 1978 AMC 519 (D.P.R. 1976), to support their position that this is exclusive maritime salvage. That case consists of six paragraphs over slightly one page of opinion. A careful reading of the opinion finds that the District Court held it *may* have jurisdiction over an aircraft which came to rest in saltwater rather than determining that it had exclusive jurisdiction. As discussed at length by petitioners, admiralty law has developed as a very precise, specific and limited body of law. In Alaska, glaciers move more quickly than this area of law with its quite ancient principles. Although it may not be "sensible" to differentiate between land based or water based aircraft, or between floating vessels and other things which come to rest in the water, such arcane distinctions seem to be a major embodiment of admiralty law.

In lower court pleadings petitioners cited *Lambros Sea Plane Base, Inc. v. The Batory*, 215 F.2d 28 (2nd Cir.

1954), as the controlling case on this issue. The commentators and a review of the case make it clear that it only discusses the salvage of a *sea based* plane. Again, respondent would submit that this is an important distinguishing feature from the case at hand. There is no American legislation which directly covers the salvage of aircraft. There are a variety of statutes which attempt to define "vessel" wherein it appears that aircraft are sometimes within those definitions and sometimes excluded, Gilmore and Black, *Law of Admiralty* (2nd Ed.) §8-3 at 539, 540. That commentator noted only that *Lambros, supra,* is the leading case and most recent regarding aircraft. The commentators were silent on what the law was (as opposed to should be) as to admiralty jurisdiction over land based aircraft. Another commentator has stated that he felt it would be appropriate to extend *Lambros* to *land based* aircraft, 3A *Benedict* §41 at 3-16, 3-17. A further review of that volume makes it quite obvious that the commentator's review of *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249 (1972), left him with the strong impression that this court would not support that extension. The author noted that "at the very least" it was very questionable whether admiralty jurisdiction would be expanded to include salvage services to land based airplanes which come to rest in navigable waters. *Id.*; see also 68 *AmJur 2d* "Salvage" §561 (Lawyers' Coop. 1993 Supp.).

Although it may seem a fine distinction between land based and sea based aircraft, it appears that admiralty law is replete with such distinctions. It is interesting to note that *Mark, supra,* did not discuss either the *Lambros* or the *Executive Jet* decisions. Again, the plaintiff would submit that the decision, if not in error, at most supports the proposition that the claim *may* be brought in federal court rather than exclusively being in the federal court.

CONTRACT/"SALVAGE AWARD"

As mentioned hereinabove a "salvage claim" entails a "salvage award":

> Under traditional salvage rules, the salvor receives a lien against the salved property (citations omitted) and is usually entitled to his expenses, plus a salvage award (citation omitted). "It is basic that more than a *quantum meruit* is involved; salvors are to be paid a bonus according to the merit of their services." *Cobb Coin v. An Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186, 207 (S.D. Fla. 1981).

In determining the amount of a *salvage award* the court should determine whether there was a high, medium or low order of salvage service. *Ibid.* The salvor should be liberally rewarded as a continuing incentive to others to undertake the physical and financial risks attendant to salvage operations. *Ibid.* The court must look at the value of the salved property and "look to reward superior zeal, energy and gallantry, and to discourage indifference and selfishness in salvage efforts". *Id.* at 207, 208. Courts and commentators have frequently commented on the "peculiar system awarding fee compensation" in salvage cases, *O'Neill v. Schoenbrod*, 355 So.2d 440 (Fla. App. 1978); 68 *AmJur 2d* "Salvage", §40 at 343. Other commentators have referred to the "extraordinary processes" of the admiralty court in determining the salvage award, 78 *CJS* "Salvage", §151 at 568; *Dade County* at 928-929. The courts have recognized a need for specialized expertise and for uniform consistency in determining the "bonus" or "reward" to be granted the salvor in balancing the value of the salved property, the risks undertaken and the meritoriousness of the efforts. That *AmJur 2d* comment notes that it is salvage proceedings which are a cause of action which lies within the exclusive jurisdiction, 68 *AmJur 2d*,

§39 at 343. See also 3A *Benedict* §14 at 1-20, 1-21. Admiralty courts have exclusive jurisdiction where there is a claim for "a *salvage award* based on the elements of a salvage service," i.e., a bounty. See also *Dade County* at 926-927. No such expertise is required herein as the parties negotiated the specific amounts of compensation which could be charged, regardless of the result. It's worthwhile to note that the negotiations took place at leisure rather than during circumstances of immediate peril to life or property due to emergency conditions.

CONTINGENCY OF FEES—"NO CURE NO PAY"

Commentators make it clear that a "salvage award," more specifically, a voluntary salvage, would arguably be within the exclusive jurisdiction of the court only if the obligation to pay was contingent upon successful recovery efforts. Although the standard salvage contract drafted by Lloyd's of London may at times include a specific negotiated fee rather than leaving the fee to chance determination by the court, those contracts all contain a contingency of recovery of the property as a condition precedent to payment of the fee. See 3A *Benedict*, §1, et seq.

Another commentator suggests that agreement to pay for unsuccessful services would not be a salvage claim and that a contract calling for such payments would not be within the jurisdiction of the admiralty court, Gilmore and Black, *The Law of Admiralty*, 2d Ed. (The Foundation Press) §8-3 at 581. The commentator noted that salvage agreements entered into with professional salvors[7]

[7] Respondents would again note that petitioners were the salvors. Respondent was an "employee" hired at negotiated rates to perform a specific task.

after the emergency had passed and there was an ability to consider all factors and to communicate between the parties were naturally much less subject to any need for judicial reformation or review. See *Flagship Marine Services v. Belcher Towing*, 966 F.2d at 605. Further, the officers and crew of a professional salvor were not in the same position as those who fortuitously engage in salvage. They received their agreed wages and may not after each operation run to a court to ask for more. Gilmore and Black, §8-3 at 539, 540. While most commercial businesses expect to be paid regardless of the result, apparently many maritime salvors are willing to take the risk of "no cure-no pay". *Ibid.* The parties in this instance specifically agreed to a non-contingent fee. Respondent believes that this claim is not even within the optional jurisdiction of the federal court.

> It is entirely possible for a ship owner to agree to pay for salvage services to ship or cargo whether or not they are successful, although the metaphysical argument might be made that payment for unsuccessful services would not be salvage and that a contract calling for such payments would not be within the jurisdiction of the admiralty, *Ibid.*

CONSISTENCY OF LAW

The defendants have made much of the need for the specialized expertise of the admiralty courts and the need for national and international consistency in the determination of salvage awards. Such consistency or expertise is not necessary in this case. The specialized skills necessary to determine who is a salvor, ownership of the object and how to determine the compensation award not involved herein. This is a very simple contract case in which, fortuitously, services were performed in and over water rather than purely on land. That chance occurrence should

have no bearing on the determination of petitioners' obligation herein.

The law is consistent in supporting the conclusion that the Alaska court clearly had jurisdiction over this contract claim. Although respondent may have been entitled to file the case in U.S. District Court or may have been entitled to request a "salvage award" it chose not to do so. It chose to bring its cause of action based on the written contract. The petitioners are not entitled to force respondent to accept an alternate remedy or theory of law, *Fogelman*, 747 F.Supp. at 355. See also *Bergeron v. Quality Shipyards, Inc.*, 765 F.Supp. at 323. Alaska law is in conformance with the Constitution, the saving to suitors clause and case law in federal and state courts.[8]

The petitioners cite nine Alaska cases, all but one in state court, in support of their argument that Alaska courts improperly ignore the primacy of federal admiralty jurisdiction. In *F/V AMERICAN EAGLE v. State*, 620 P.2d 657 (Alaska 1980) and *State v. F/V BARANOF*, 677 P.2d 1245 (Alaska 1984) the issue was whether the State could regulate fishing activities outside the three mile territorial limit. In *Maxwell v. Olsen*, 468 P.2d 48 (Alaska 1970), *Shannon v. City of Anchorage*, 478 P.2d 815 (Alaska 1970) and *Barber v. New England Fish Company*, 510

[8] Respondent has not replied to the assertion that Alaska courts are "judicial pirates" for monetary reasons. Petitioners' first argument, that local magistrates' salaries are based on case load is inapposite. This case was filed in state court and was heard by a Superior Court Judge sitting in District Court. It was not filed before a magistrate, nor were any of the Alaska cases cited in petitioners' brief. Second, entitlement to fees or interest rates are determined by the law which creates the basis for the obligor's purported duty to pay, *In Re: The GLACIER BAY*, 746 F.Supp. 1379, 1383-1384 (D.Ak. 1990).

P.2d 806 (Alaska 1973), the claims arose out of injuries to passengers or workers on vessels. In *Williams v. Eckert*, 643 P.2d 991 (Alaska 1982), the owner of the boat brought a claim against the "salvor" for wrongful detention of the boat. In *Estate of Rhyner v. Farm Credit Bank of Spokane*, 780 P.2d 1001 (Alaska 1989), there was an attempt to obtain a deficiency judgment against the vessel owners after the U.S. District Court proceeding had resulted in foreclosure and sale of the ship pursuant to its Preferred Ship's Mortgage. *The GLACIER BAY, supra*, dealt with the claims of fishermen for loss caused by an oil spill. In *Bjornnson v. U.S. Dominator, Inc.*, ____ P.2d ____ (Alaska Supp. Op. No. 4023, November 12, 1993), the Alaska Supreme Court interpreted federal wage statutes to determine the compensation rights of a seaman. In all these cases the court has consistently shown a clear understanding of the possible overlay or preemption of federal law relating to maritime matters. The court has stated that:

> . . . Generally, the "saving to suitors" clause means that a suitor asserting an *in personam* admiralty claim may elect to sue in a "common law" state court through an ordinary civil action, *Maxwell*, 468 P.2d at 51 citing *Madruga v. Superior Court*, 346 U.S. 556, 551 (Alaska 1954).

In *Maxwell* the court recognized that when a case had sufficient maritime contact the Alaska courts were required to apply substantive federal law although it might be appropriate to apply Alaska procedural law, *Id.* at 50. At that time Alaska had not yet adopted comparative negligence. The court held that substantive maritime law required the application of comparative rather than contributory negligence. *Ibid.* See also *Shannon*, 478 P.2d at 818, 820.

In *Barber* the Alaska Supreme Court stated that this Court "has acknowledged a process of accommodation of federal and local interest in areas of overlapping state and federal concern," *Id.* at 811. The court quoted at length from a previous decision of this court:

> . . . Perhaps the most often heard criticism of the supremacy doctrine is this: the fact that maritime law is—in a special sense at least—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, *no matter how slight or marginal*, it must displace a *local interest*, no matter how pressing and significant. But the process is rather one of *accommodation*, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of law situation where two sovereignties assert divergent interest in a transaction as to which both have some concern. Surely the law of federal supremacy is adequately served by the availability of a federal forum in the first instance and a review in this court to provide assurance that the federal interest is correctly assessed and accorded due weight.
>
> Thus, for instance, it blinks at reality to assert that because a longshoreman, living ashore by shore side employers, performs seaman's work, the state with those contacts must lose all concern for the longshoreman status and well-being. *Barber*, *Ibid.*, citing *Kossick v. United Fruit Company*, 365 U.S. 731, 738-739 (1961). (Emphasis added)

The Alaska courts have paid due deference to federal law and, when appropriate, have consistently applied substantive federal maritime law. The Alaska courts have found that state courts should not be easily divested of jurisdiction by merely waving the maritime flag. "Preemption will be found only when the 'clear and manifest pur-

pose' of Congress was to occupy the field." *State v. F/V BARANOF*, 677 P.2d at 1249, citing *Philadelphia v. New Jersey*, 437 U.S. 617, 621 at n.4 (1978).

In addition to the legal arguments as stated in *Barber* the Alaska court has also noted the pragmatic concerns of the heavy federal case loads and a need to determine the extent of the necessity for an expert federal tribunal to handle the issues in a particular case, *F/V BARANOF*, 677 P.2d at 1253. The court also noted the difference in wording between the "saving to suitors" clause as stated in the Judiciary Act of 1789, 1 Stat. 76-77, §9 and as presently set forth in 28 USC §1333, although the "wording is different, the substance of the provision is the same." *Id.* at 1254, n.16 citing this court in *Madruga*, 346 U.S. at 560, n.10.[9]

[9] At first blush *F/V BARANOF* might appear to be not applicable as it related to the *in rem* forfeiture of a fishing vessel. Historically *private in rem* proceedings were not permitted at common law, but *in rem* forfeiture actions brought by the "[government] were permissible in common law courts," *Id.* at 1254 citing *C.J. Hendry Company v. Moore*, 318 U.S. 133, 137-153 (1943). Interestingly, the U.S. District Court refused to accept a petition for removal in *F/V BARANOF*. In a similar manner, in *Estate of Rhyner*, the court recognized the exclusive federal *in rem* jurisdiction regarding foreclosure of the Preferred Ship's Mortgage, but found a common law right to proceed for a deficiency judgment against the debtor, 780 P.2d at 1004.

CONCLUSION

The claims of respondent are based upon the written contract. The Alaska Court had jurisdiction to enter judgment against petitioners. The need to determine whether there was no jurisdiction or whether state jurisdiction was concurrent with federal. There is no conflict between the Constitution, the "saving to suitors" clause.

Respectfully submitted,

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